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No. 77-1452

In the Supreme Court of the United States

OCTOBER TERM, 1977

ADOLPH LEWIN and JOYCE LEWIN, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
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The sole question presented in this federal income tax case is whether the Tax Court correctly dismissed the petition for a redetermination of a deficiency for lack of jurisdiction on the ground that it was not filed within the period prescribed by Section 6213(a) of the Internal Revenue Code of 1954, as amended, 26 U.S.C.

The pertinent facts are as follows: On June 18, 1973, the Commissioner sent by certified mail a statutory notice of deficiency, correctly addressed to petitioners at their residence in Glenview, Illinois. The records of the Postal Service indicate that the mail carrier found no one home when he first attempted to deliver the notice, and that he left a postal service form 3849 in petitioners' mailbox notifying them of the attempted delivery. Ten days later, when the mail was still unclaimed, the letter carrier left

another notice of attempted delivery. Finally, two weeks after the first notice, the letter was marked "unclaimed" and returned to the Internal Revenue Service. No further attempt to deliver the deficiency notice was made (Pet. App. 4-5).

Several months later, petitioners' attorney obtained a copy of the deficiency notice from the Internal Revenue Service, and, on April 23, 1974, petitioners filed a petition in the Tax Court seeking a redetermination of the deficiency (Pet. App. 5). The Tax Court dismissed the case for lack of jurisdiction because the petition was not filed within 90 days of the mailing of the deficiency notice as required by Section 6213(a) of the Code (Pet. App. 3-8). The court of appeals affirmed (Pet. App. 1-2).

1. Section 6213(a) of the Code generally requires the Commissioner to issue a notice of deficiency relating to income tax liabilities before assessing and collecting the taxes in question. The statute further provides that a petition contesting the Commissioner's determination may be filed in the Tax Court within 90 days "after the notice of deficiency * * * is mailed * * *."[1] Section 6212(a) specifically authorizes the Commissioner to send the notice of deficiency to the taxpayer by certified or registered mail, and Section 6212(b) provides that this notice "shall be sufficient" if mailed to the taxpayer's "last known address."

The statute is clear that the time for filing a petition for a redetermination of the deficiency in the Tax Court runs from the date the Commissioner properly mails the notice of deficiency to the taxpayer's "last known address" and

[1]Where a petition for a redetermination of the deficiency is timely filed in the Tax Court, Section 6213(a) generally prohibits assessment and collection until the Tax Court enters its final decision.

not from the date the notice is actually received. See, *e.g.*, *Wilson* v. *Commissioner*, 564 F. 2d 1317, 1319 (C.A. 9). Here, it cannot be disputed that the notice of deficiency was properly mailed under Section 6212, and that the petition for the redetermination of the deficiency was untimely under Section 6213(a). As petitioners concede (Pet. 3, 5), the notice was mailed to the address that appeared on their return for the year in question and which remained their actual residence at the time the notice was issued. Contrary to petitioners' contention (Pet. 11-14), there is no requirement that the Commissioner issue multiple deficiency notices to all of the various addresses of which he might learn or that he take further steps to send additional notices of deficiency once a properly mailed notice is returned undelivered. See *Brown* v. *Lethert*, 360 F. 2d 560 (C.A. 8); *Luhring* v. *Glotzbach*, 304 F. 2d 556 (C.A. 4); *Williams* v. *United States*, 264 F. 2d 227 (C.A. 6), certiorari denied, 361 U.S. 862.[2]

[2]Indeed, the time for filing a petition in the Tax Court runs from the first proper mailing even where a notice is sent to a new address after the first notice is returned undelivered. *Pfeffer* v. *Commissioner*, 272 F. 2d 383 (C.A. 2). *Eppler* v. *Commissioner*, 188 F. 2d 95 (C.A. 7), upon which petitioner relies (Pet. 13), is not to the contrary. There, the court held that the time would run from a second mailing on the ground that the taxpayer had been misled by the second mailing since he was not advised of the first. See *Boccuto* v. *Commissioner*, 277 F. 2d 549, 553 (C.A. 3). Moreover, it was specifically noted in *Eppler* that "if * * * the second registered letter had not been mailed to the taxpayer the mailing of the first letter would have started the ninety day period of limitations * * *." 188 F. 2d at 98.

None of the other decisions petitioners cite (Pet. 11-14) supports their claim. Both *Clodfelter* v. *Commissioner*, 527 F. 2d 754 (C.A. 9), certiorari denied, 425 U.S. 979, and *Berger* v. *Commissioner*, 404 F. 2d 668 (C.A. 3), certiorari denied, 395 U.S. 905, hold only that the requirements of this statute are satisfied where taxpayers receive actual notice of the Commissioner's deficiency determination whether

2. The court below correctly rejected petitioners' contention (Pet. 9-10) that Sections 6212 and 6213 deprive them of due process because they permit the time for contesting a deficiency determination in the Tax Court to expire 90 days after the mailing of the notice of deficiency whether or not the notice was actually received. The statutory scheme Congress adopted is reasonably designed to assure that the notice of deficiency will be received in the vast majority of cases. Moreover, the statutory period, which begins to run upon mailing, provides the Commissioner with an ascertainable and objective standard for determining when he may assess and collect the tax deficiency.

Taxpayers who do not receive actual notice of the Commissioner's deficiency determinations are not denied their right to challenge the Commissioner's assertions of liability. As this Court pointed out almost 50 years ago in *Phillips* v. *Commissioner*, 283 U.S. 589, they remain free to pay the tax, file claims for refund, and, if those claims are denied, to bring refund suits in the district court or the Court of Claims. In *Phillips*, the

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or not the deficiency notice was mailed to a proper address under Section 6212. *Welch* v. *Schweitzer*, 106 F. 2d 885 (C.A. 9), involved a deficiency notice sent to an address which was neither the "last known address" nor the actual residence of the taxpayer. In *Estate of McKaig* v. *Commissioner*, 51 T.C. 331, the Commissioner was put on notice that a correctly addressed deficiency notice had been improperly diverted by the Postal Service to an incorrect address. As the Tax Court found (Pet. App. 7), no such circumstances were presented here.

Finally *MacKenzie* v. *D.C. Unemployment Compensation Board*, 393 F. 2d 659 (C.A. D.C.), involved not only a different statutory scheme, but also completely distinguishable facts. There, notice of an adverse determination on an unemployment compensation claim was held ineffective where the unemployment compensation board knew that the temporary address to which it was sent had already been abandoned and that the claimant was returning to her permanent address, which was also known to the board.

Court held that these separate refund suits met the requirements of due process without regard to the availability of the alternative prepayment procedures Congress established. Accord: *Cohen* v. *United States*, 297 F. 2d 760, 772 (C.A. 9), certiorari denied, 369 U.S. 865; *Brown* v. *Lethert*, *supra*, 360 F. 2d at 562; *Drake* v. *Commissioner*, 554 F. 2d 736, 739 (C.A. 5); *Wilson* v. *Commissioner*, *supra*, 564 F. 2d at 1319. See also *Berger* v. *Commissioner*, *supra*, 404 F. 2d at 674.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

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[3] *Robinson* v. *Hanrahan*, 409 U.S. 38, upon which petitioners rely (Pet. 9, 11), is distinguishable. In that case, the Court did not hold that procedures such as those prescribed in Sections 6212 and 6213 are unconstitutional. It held only that a notice of forfeiture proceeding sent to the home address of the owner of property was insufficient where the state knew that he was not at that address and would not receive the notice because he was in jail. Moreover, unlike this case, the property owner in *Robinson* was deprived of the only forum in which to seek review of the state's actions.

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